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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HENRICO SOUTHWARD, Defendant and Appellant.	B279209 Los Angeles County Super. Ct. No. NA024609

APPEAL from an order of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Henrico Southward, currently serving a third strike sentence, appeals from the denial of his petition under Penal Code section 1170.126 to recall his sentence. We find no abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Southward's first two strikes*

About 10:00 p.m. on May 10, 1991, a husband and wife were walking on a jogging trail in Walnut, California. Southward—who was about a month shy of his 18th birthday—ran up behind them. When the victims heard footsteps, they turned and saw Southward holding a .32-caliber Mauser pistol. Southward pointed the gun at the male victim and said, "Give me your money. I want your money now." The male victim told Southward, "I don't have any money. All I have is my keys. I will give you my keys." Southward did not take the keys; he told the victims not to call the police and walked away.

A short time later, police saw a Cadillac leaving the area. Southward was in the car with two other young men. Police found a .32-caliber semiautomatic weapon under the driver's seat with one round in the chamber and six in the magazine. Southward told an officer he had done the robbery, his companions had nothing to do with it, and his "tre-deuce" was the only weapon in the car. Southward told the officer he was a Compton Neighborhood Crip with the moniker "Persey."

The female victim later told the probation department that she and her husband were both very scared. After the incident, the male victim had trouble sleeping and had to go to the doctor because of chest pains. The victims did not go outside as much as they once had, and they did not walk or jog on the trail anymore. They were considering moving out of the area. The female victim

told probation it had been a terrible experience but she was thankful Southward had not killed her.

Southward—who had a criminal record dating back to when he was 10 years old and who was on parole from the California Youth Authority (CYA) at the time—was found unfit for juvenile court. He pleaded no contest to two counts of attempted second degree robbery and admitted the allegation that he personally used a firearm in the commission of the crimes. Southward was sentenced to six years and eight months, to be housed at the CYA.

2. *Southward's commitment offense*

On May 27, 1995, at about 11:40 at night, Long Beach police officers noticed a Monte Carlo driving oddly. The officers then saw the car had expired tags. They turned on their red lights and siren but the car sped away. The officers pursued the car, which accelerated to 60 miles per hour, made erratic lane changes, and ran a red light. Eventually, the Monte Carlo hit a stop sign and stopped.

The officers found Southward at the wheel and arrested him. According to the probation department report, Southward told the officers, "You just saved some gangster's life tonight. . . . Yeah, the four corner block shot at me tonight and I was gonna do 'em." Southward told police he had been planning to get an AK-47.

A jury convicted Southward of felony evading in violation of Vehicle Code section 2800.2. In December 1996, the trial court sentenced Southward to a third strike sentence of 25 years to life.

3. *Southward's petition*

In April 2013, Southward filed a petition for a writ of habeas corpus in the superior court. Southward referred to a

"new state law." The trial court deemed Southward's writ petition to be a petition for recall of sentence under Proposition 36, Penal Code section 1170.126.[1] The court issued an order to show cause. In June 2013, the People requested, and the court granted, an extension of time. In July 2013, Southward filed another pleading entitled, Motion for Immediate Resentence under Section 1170.126 in the Furtherance of Justice. In late July 2013, the trial court on its own motion appointed counsel for Southward.

The People eventually filed their opposition, with exhibits, to Southward's petition in January 2014. Southward's court-appointed counsel filed a reply—together with a number of exhibits—in October 2014. Southward submitted a written waiver of his personal presence.

The trial court held a status conference in December 2014. Over the next 18 months or so, the parties conducted further proceedings, including litigation over the People's subpoena to the California Department of Corrections and Rehabilitation (CDCR) for confidential records of Southward's involvement in a 2008 inmate plan to attack staff.

4. *The suitability hearing*

In April 2016, Southward's case was assigned to Judge Rand S. Rubin for the suitability hearing. The court conducted the hearing on August 30, 2016. The court stated at the outset that "[t]here ha[d] been a determination that [Southward] [was] eligible for . . . resentencing" and was entitled to "be resentenced unless the court in its discretion determines that [re]sentencing the petitioner would pose an unreasonable risk of danger to

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[1] Statutory references are to the Penal Code.

public safety pursuant to Penal Code [section] 1170.126 subdivision (f)." The court said it had read all of the pleadings, the exhibits submitted by both the People and Southward, and "the entire court file."

a. *Richard Subia's testimony*

Southward called Richard Subia as a witness. Subia testified he had worked for nearly 27 years in corrections in California. While at CDCR, Subia was involved in conducting risk assessments for offenders in custody as well as those "who would be released to the community." Subia said he considered both static factors—commitment offenses, gang activity, and relationships in the community—and "dynamic factors"—in-custody behavior, participation in programs, and violation of policies and procedures.

Subia used this same assessment process to evaluate Southward. Subia testified that, in his opinion, Southward "would not pose an unreasonable risk of dangerousness" if released. Subia stated it was "clear" "in the documentation" that Southward "had been involved in gang activity from an early age": he was 11 when he joined the Compton Crips. Subia acknowledged Southward's "last probation reports indicate[ ] that he was a member of the Compton Crips." Subia also acknowledged that Southward had "had some involvement in racial incidents": "[h]e was in two separate riots involving black inmates and white inmates." But, Subia said, "none of those incidents were identified as gang-related incidents."

Subia also acknowledged that an April 2008 CDCR document about a plan by Crips to assault staff "name[d]" Southward. But, Subia said, there was no indication in the file that officials had "validated" Southward as a gang member or

found Southward's rules violations to have been "associated with gang activity." Subia conceded, however, that it is "possible to be part of a gang and not be validated."

Subia testified Southward's last rules violation was in 2008 and, since he completed a behavior modification program, he had "not received any other violations." Subia acknowledged Southward had been found in 2000 with "an-inmate manufactured weapon rod-like piece with plastic melted on one end and sharpened to a point." Southward had pleaded to a felony charge for that weapon, Subia said. Subia questioned whether a second weapon found in Southward's cell in October 2007 was actually his rather than his cellmate's.

Subia acknowledged Southward's "initial participation" in rehabilitative programming was "slim." Subia noted Southward "was able to get assigned at High Desert [State Prison] for a couple of years in a yard maintenance crew where he received good ratings." Subia said Southward had taken some courses in life skills, substance abuse prevention, and anger management while in the behavior modification unit. Subia also noted Southward had been working as a porter for about three years. Subia stated some of Southward's "inability to program" was based on his housing and "some [was] based on his own participation."

Subia testified Southward's California Static Risk Assessment (CSRA) score was "low," a 1. Subia said Southward had letters from organizations that would "assist him in finding housing" and in job training if he were released.

On cross-examination, Subia acknowledged that Southward had been arrested for residential burglary when he was 10 years old and that he joined the Compton Neighborhood Crips at 11.

When asked about a CYA social worker's statement that Southward was "deeply entrenched in the gang subculture," Subia responded, "Entrenched in the subculture would mean that he sees the gang as his family and his life."

When asked if Southward had "had a really active juvenile career" in committing crimes, Subia answered, "Yes." Subia characterized Southward's "juvenile life" as "serious," "violent," and "sad." Subia said Southward had no "structured upbringing"—"no kind of parental figure he could go to for guidance." Subia acknowledged that while at CYA Southward threw a rock at an instructor, hitting him in the head, and engaged in sexual misconduct.[2]

The prosecutor asked Subia about Southward's statement to police when stopped for evading, "You just saved some gangster's life tonight." Subia responded, "That means that he was in the car with the intention of going to take action against a rival gang . . .[;] he had been shot at by a gang earlier in the day and he was going to go seek retribution." Subia conceded that statement reflected "serious and dangerous and violent intent."

Subia acknowledged that Southward was "pretty entrenched in the gang culture from age 10 or 11 all the way through his current commitment offense" and that "he was very active in the criminal gang lifestyle in the community."

Subia conceded Southward had committed 14 serious rules violations—so-called 115's—including unlawful assembly, participation in prison riots, battery, possession of a deadly weapon, and mutual combat. Five of these were serious enough

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[2] CDCR records stated that Southward, while at CYA, "would expose himself and masturbate towards female staff."

that Southward was sent to the security housing unit, the so-called SHU.

The prosecutor asked Subia about Southward's refusal to share a cell with any other inmate who was not a member of the Crips. The prosecutor inquired, "Do you think [such a person] [would be] disassociating themselves with [*sic*] the Crips, or are they still part of the Crips?" Subia answered, "It is hard to say. I would say they are still associating with them. Whether they are still actively involved, it wouldn't necessarily indicate that. It is just . . . in his case, he was denying cellmates for a long time, and he has several 115's. And then when they wanted to put someone in there he said as long as he is a Crip, you can put him in here, so he is associating with them."

The prosecutor also asked Subia about Southward's refusal in February 2016 to sign an "advisement of expectations" that CDCR asked inmates to sign. According to the prosecutor, the advisement "relate[d] to participation in any sort of gang activity and what type of behavior is expected of [inmates] [in] a particular facility." Subia said, "I don't know why he refused to sign, but he refused to sign."

The prosecutor addressed Southward's classification score. Subia testified it was 90 when Southward entered prison in 1997. As of February 2016, it was 118. As of year-end 2016, Subia predicted it might be reduced to 110. The lowest possible score for an inmate serving a life sentence is 19.

Subia testified Southward's COMPAS needs assessment was 4, "a high need," for "some sort of program" upon release on parole for assistance with "substance abuse, criminal personality, anger, educational problems, and employment problems."

Subia conceded Southward would have posed an unreasonable risk of danger to public safety as a juvenile and when arrested for evading. But, Subia said—given Southward's conduct over the last eight years after completing the behavior modification program—"currently that risk is not unreasonable."

b. *The exhibits*

At the conclusion of the hearing, the court admitted into evidence the People's 23 exhibits and Southward's 20 exhibits. The exhibits consume some 1,224 pages. They show these facts:

Classification scores: Southward's classification score initially was 90 in February 1997. In fewer than four years—by January 2001—it had risen to 144. For the next 12 years it fluctuated between 128 and 154. By June 2015, it had fallen to 118. In February 2016, it was 110—still 20 points higher than at Southward's admission to state prison 18 years earlier.

Work assignments: Upon admission to the state prison in February 1997, CDCR noted Southward had "no viable work skills." Later in 1997 and 1998, Southward worked doing "various yard chores." In reviews dated August 1997, November 1997, and February 1998, he received all "satisfactory" grades (3's on a scale of 1 to 5). In late 1999, Southward was assigned to vocational carpentry and painting but "did not attend due to an extended lockdown." At the time of the suitability hearing in 2016, Southward had worked for several years as a porter. For one three-month period in 2013 and 2014, he received all "exceptional" grades (1's on a scale of 1 to 5). In that review, his supervisor recommended a pay increase. In February 2000, prison officials recommended that Southward get his GED. There is nothing in the record to indicate he ever did.

Richard Subia's report: Subia prepared a written report. Essentially, the report tracked his testimony at the suitability hearing. Subia interviewed Southward in December 2015 at the state prison in Calipatria. Subia wrote, "Mr. Southward was questioned regarding his gang activity. He stated that he was a member of 'Eastside Neighborhood Compton Crips.' . . . Southward stated that when he came to prison, he began hanging out with other Crips. He said he never validated in prison for participating in any criminal gang activities."

Southward's demand for a Crip cellmate: Southward told prison officials he could "be housed with 'Black Crips only—nobody else. Any Crip if a solid Crip.' "

Southward's plans upon release: Southward submitted (1) a letter from Homeboy Industries stating it could provide him with "mentoring and counseling services" and assistance in finding employment; (2) a flyer regarding three months of transitional housing the Weingart Center provides for homeless individuals on Post-Release Community Supervision; (3) a flyer from an "occupational center" in downtown Los Angeles; (4) a letter from the Anti-Recidivism Coalition about the "supportive housing program" and "job training program" it offers parolees; and (5) a letter from Southward's stepfather stating that Southward was "welcome to come stay with [him] just til [Southward] gets on his own." In his initial handwritten writ petition, Southward wrote that he had "self-educated [him]self" and written his autobiography, "Unseen Spiritual Warfare." Southward said he also had written "many more book manuscripts" that he would "have published." Southward continued, "I've worked out and stayed in shape the whole time and I plan to be a professional boxing sparring partner once I'm

paroled." Under "goals," Southward wrote he planned to "invest [his] money in starting [his] own urban book publishing company" and to "train and manage" "professional boxers."

5. *The trial court's memorandum of decision*

On November 9, 2016, the trial court issued its 17-page memorandum of decision. After summarizing the applicable legal standards, the court detailed Southward's criminal history. The court noted Southward was arrested in March 1995—within two months of his release on parole in his robbery case—for taking a vehicle. In late May 1995—about four and one-half months after being paroled—Southward committed his third strike offense of felony evading.

The court described Southward's 14 serious rules violations during his incarceration, noting the last one was in 2008. The court detailed these, including Southward's participation in prison riots in 2003 and 2008 and his involvement in fights. The court noted Southward's "limited educational and vocational programming while in prison," although it acknowledged his three years of work as a porter.

The court discussed Southward's membership in the Eastside Neighborhood Compton Crips. The court noted Southward had refused as recently as June 2015 to share a cell with anyone other than a fellow Crip, and in 2016 he refused to sign the "advisement of expectations that he would not participate in gang behavior at the facility."

The trial court recited the substance of Subia's testimony in some detail. The court noted Southward's classification and CSRA scores.

Citing cases, the trial court stated that, although Southward's strike and commitment offenses "may be remote in

time," he had "continued to associate with the gang that directly contributed to his serious and violent criminal behavior." The court continued, "Given Petitioner's continuous violent and dangerous misconduct in prison, his in-custody conviction for possession of a weapon, and his insufficient rehabilitative programming, his criminal history, while remote, remains predictive of his current dangerousness."

The court wrote, "While Petitioner has not been validated as a gang member in prison, it is apparent that he continues to associate with, and identify with, the Crips." The court added, "Nothing in the record suggests that Petitioner has developed the mechanisms to act with autonomy and to reject the gang lifestyle he has embraced since he was only 10 years old."

The trial court observed that Southward's "recent conduct, CSRA, and age" were factors in his favor, as was his completion of the behavior modification program and the absence of any rules violations since 2008. But, the court said, "In his nearly 20 years of incarceration, Petitioner has only participated in one year of self-help programming." The court noted, "While he has worked as a porter for three years, he has developed no professional or vocational skills that would translate into the free community." This "limited rehabilitative programming," the court said, "compound[s]" Southward's risk of dangerousness.

Based on all of the reasons detailed, the trial court found, in its discretion and under section 1170.126, subdivision (f), that resentencing Southward would pose an unreasonable risk of danger to public safety. The court therefore discharged the order to show cause and denied Southward's petition.

DISCUSSION

1. *Proposition 36, the Three Strikes Reform Act of 2012*

In November 2012, California voters enacted Proposition 36, the Three Strikes Reform Act. With some exceptions, Proposition 36 modified California's Three Strikes law to reduce the punishment imposed when a defendant's third felony conviction is not serious or violent. (*People v. Valencia* (2017) 3 Cal.5th 347, 350 (*Valencia*).) It also enacted a procedure governing inmates sentenced under the former Three Strikes law whose third strike was neither violent nor serious, permitting them to petition for resentencing in accordance with Proposition 36's new sentencing provisions. (§ 1170.126, subd. (e).)

"The resentencing provisions provide, however, that an inmate will be denied resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Valencia*, *supra*, 3 Cal.5th at p. 350.) "Proposition 36 did not define the phrase 'unreasonable risk of danger to public safety.' " (*Ibid*.) In *Valencia*, our Supreme Court stated, "In exercising its discretion to deny resentencing, the court has broad discretion to consider: (1) the inmate's 'criminal conviction history, including the types of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes'; (2) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an

unreasonable risk of danger to public safety.' (§ 1170.126, subd. (g)(1)-(3).)" (*Id.* at p. 354.)[3]

The prosecution must prove a petitioner's unsuitability—that is, that resentencing him would pose an unreasonable risk of danger to public safety—by a preponderance of the evidence. (*People v. Frierson* (2017) 4 Cal.5th 225, 239 (*Frierson*); *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301-1305.)

2. *Standard of review*

We review a denial of resentencing based on dangerousness under a mixed standard. We review the facts and evidence on which the court based its finding of unreasonable risk for substantial evidence. (*Frierson, supra,* 4 Cal.5th at p. 239; *People v. Losa* (2014) 232 Cal.App.4th 789, 791.) We review the trial court's finding that the defendant presents an unreasonable risk of danger to public safety under the abuse of discretion standard. (*Losa*, at p. 791.) " 'Where, as here, a discretionary power is

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[3] In his opening brief, Southward argued the definition of "unreasonable risk of danger to public safety" in Proposition 47, the Safe Neighborhood and Schools Act, section 1170.18, should apply to Proposition 36 cases as well. In his reply brief, Southward withdrew this argument in light of the Supreme Court's rejection of that contention in *Valencia*. Southward continues to assert that Proposition 36's "risk of danger" language is unconstitutionally vague. As the *Valencia* court noted, California courts "have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague." (*Valencia*, *supra*, 3 Cal.5th at pp. 354-355, citing *People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075.)

statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" ' (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) The abuse of discretion standard 'involves abundant deference' to the court's ruling. (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)" (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243.)

3. *The trial court did not abuse its discretion in denying Southward's petition for resentencing*

The trial court here considered Subia's testimony and hundreds of pages of exhibits. The court issued a lengthy, thorough, and thoughtful memorandum of decision. The court stated its "dangerousness evaluation" was "a factual inquiry that is guided by the factors" set forth in the statute: Southward's conviction history, his record of discipline and rehabilitation, and other evidence the court determined to be relevant.

Southward's strikes and commitment offenses, while remote, present considerable cause for concern. Southward tried to rob two hikers with a loaded semiautomatic firearm, leaving them frightened and grateful they had not been killed. Less than five months after being released from custody, he led police on a high-speed chase and admitted he had been planning to get an AK-47 and shoot a rival gang member. Southward committed serious misconduct in prison, leading to another felony conviction for possessing a shank. He was cited for battery, mutual combat, and participating in riots, as well as lesser violations.

While Southward is to be commended for completing the behavior modification program and remaining discipline-free

between 2008 and 2016, the trial court properly focused on additional concerns about (1) Southward's continuing association with the Crips, and (2) his lack of any realistic reentry plans upon release. Southward told prison officials he would share a cell only with "solid Crip[s]." While he had "satisfactory" work reviews for yard tasks, and a grade of "exceptional" for a three-year period as a porter, Southward never explained how his work as a porter could translate into job skills or employment outside of prison. Instead, Southward wrote that he planned to establish his own publishing company, publish his autobiography and other manuscripts, and train and manage professional boxers. These plans reflect a lack of any appreciation of the real world outside of prison or any concrete steps that Southward can take toward gainful employment. Finally, his classification score remains higher than it was upon his admission to prison in 1997. Southward never brought his score down to anything close to the score of 19 that an inmate serving life can achieve.

Indisputably, Southward has had a sad—even tragic—life. But that is not the issue. The issues are whether the People have proved by a preponderance of the evidence that Southward's resentencing would pose an unreasonable risk of danger to public safety, and whether the trial court abused its broad discretion in reaching the conclusion that the People had met their burden. On this record, we can find no abuse of discretion.

DISPOSITION

We affirm the trial court's order denying Southward's petition for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

I CONCUR:

EDMON, P. J.

KALRA, J.,* Dissenting.

Although I agree with much of the majority's analysis, I respectfully disagree with the ultimate holding. For 23 years Henrico Southward has been incarcerated in state prison for committing a nonviolent felony when he was 21 years old. Despite *eight* years of discipline-free conduct, glowing prison job performance reviews, strong community and family support, the trial court, nevertheless, denied his petition to recall his sentence, finding Southward would pose an unreasonable risk of danger to public safety. In my view, the trial court's decision was based upon facts, critical to its decision, that the prosecution did not prove by a preponderance of the evidence. Most significantly, substantial evidence did not support the trial court's factual finding that Southward "was noted as an Eastside Neighborhood Crips as recently as June 2015." Since this unsubstantiated fact was the foundation of the trial court's finding of current dangerousness, I respectively dissent. Accordingly, I would reverse the trial court's order and remand the matter for a new sentencing hearing.

1. *Proposition 36*

In November 2012, the electorate passed the Three Strikes Reform Act of 2012 (Proposition 36) which sought to ameliorate the harshness of the "Three Strikes" law by allowing those who had been sentenced under the previous sentencing scheme to petition for resentencing in order to "save funds that would otherwise be spent incarcerating an inmate who has served a

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

sentence that fits the crime and who is no longer dangerous." (*People v. Johnson* (2015) 61 Cal.4th 674, 695.) Proposition 36 mandated that "[a]n inmate who is serving a third strike sentence that would have yielded a second strike sentence under Proposition 36's new sentencing rules 'shall be resentenced' as [a] second strike offender 'unless the court, in its discretion, determines that resentencing the petitioner would *pose an unreasonable risk of danger to public safety*.' (§ 1170.126, subd. (f).)" (*People v. Valencia* (2017) 3 Cal.5th 347, 354, italics added.)

In exercising its discretion to deny resentencing in response to a Proposition 36 petition, "the court has broad discretion to consider: (1) the inmate's 'criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes'; (2) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (g)(1)–(3).)" (*People v. Valencia*, *supra*, 3 Cal.5th at p. 354.) "[T]he proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety." (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746 (*Esparza).*)

The People have the burden to prove by a preponderance of the evidence the facts upon which the trial court predicates a finding that the Southward poses such an unreasonable risk. (*People v. Frierson* (2017) 4 Cal.5th 225, 239; *People v. Buford* (2016) 4 Cal.App.5th 886, 899.) We review those facts for

substantial evidence (*Frierson*, at p. 239; *Buford*, at pp. 893, 901) and the finding for abuse of discretion. (*Buford*, at pp. 895, 901.)

"[S]ubstantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred. . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) "If a factor . . . is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk." (*People v. Buford*, *supra*, 4 Cal.App.5th at p. 901.) Thus, it is an abuse of discretion if the trial court relies on facts, critical to its decision, that were not proven by the prosecution. (*Esparza*, *supra*, 242 Cal.App.4th at pp. 744–745; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

The facts of *Esparza*, *supra*, 242 Cal.App.4th 726 are instructive. In *Esparza*, the trial court denied the defendant's request for resentencing under Proposition 36, finding the defendant posed an unreasonable risk of danger to public safety. The trial court based its dangerousness assessment on the defendant's criminal record and the fact that "defendant's commitment to AA was insincere" since "defendant had only started his AA classes" after the act had passed and he had only been attending for six months. (*Id.* at p. 744.) In actuality, the record established that the defendant had been attending AA meetings for two years, months before the act passed. (*Ibid.*) The prosecution presented no evidence to the contrary. Thus,

Esparza found there was not substantial evidence to support the finding that the defendant was only in treatment for six months and that he commenced his treatment in response to the act. (*Ibid*.) Moreover, because these facts were critical to the trial court's finding of dangerousness, *Esparza* reversed the trial court's finding and remanded the matter for a new sentencing hearing. (*Id*. at pp. 744–745.)

Similarly here, as shown below, the trial court made findings of fact, critical to its finding of current dangerousness, that were not proven by the People.

2. *No substantial evidence that Southward was an Eastside Neighborhood Crips as recently as June 2015*

Relying upon People's exhibit 21, the trial court made a finding of fact that Southward was an Eastside Neighborhood Compton Crip (Eastside) in 2015, just one year before the trial court held the suitability hearing in 2016. There was no substantial evidence to support this factual finding. On the contrary, People's exhibit 21 does not in any way indicate that Southward was an Eastside gang member in 2015. Richard Subia, who performs risk assessments for offenders, testified that while People's exhibit 21, a "threat assessment" form, may have been filled out on June 5, 2015, it was actually based upon Southward's *entire* prison history.[1] Subia's testimony was unchallenged on this point. To be sure, Southward never disputed that he was an Eastside from about age 10 to 22, *before*

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[1] Subia explained that the California Department of Corrections and Rehabilitation (CDCR) created the form in response to racial bias litigation to dispel the allegation that prisoners were being locked down based on racial factors.

he was incarcerated. His initial prison intake report from 1997 reflected this admission in his California Department of Corrections (CDC) 812.[2] Thus, as expected, the assessment form had a box checked for being associated with Eastside on CDC 812. However, while the box was marked, Southward scored "zero" for gang ties on the worksheet. More significantly, there was no date or source document associated with the entry. Instead, Southward's prison records time and time again affirmatively noted no prison gang. After a thorough search of Southward's entire prison file, Subia was unable to find any prison documentation showing that Southward was ever in a prison gang or engaged in gang activities.

Furthermore, Subia opined that the Eastside reference in Southward's file may have been based upon an April 2008 confidential information disclosure form. The extent of the disclosure was limited. According to the form, confidential information was received that three Crip gang members were actively recruiting other Black inmates to attack staff. Southward was *not* named or identified as a Crip member, but presumably he was one of these unnamed "other Black inmates." Notably, Southward was *never* charged with misconduct related to these allegations even though inmates can be charged based upon confidential accusations alone.[3] The only other gang

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[2] There are numerous references to a CDC 812 and CDCR 812 in the record, but nowhere in the record is there a description of the purpose of this form.

[3] Although Judge Rand S. Rubin presided over the suitability hearing, Judge William C. Ryan had previously reviewed the full confidential document in camera and

validated activity Subia found was from Southward's *preconviction* probation officer's report from 1996.

Close examination of People's exhibit 22 offers a likely source of the CDC 812 connection to Eastside referenced in People's exhibit 21. People's exhibit 22, which consisted of Southward's classification reports from 1997 to 2016, contained numerous documents that repeatedly noted the following: "Inmate is a member/associate of . . . Eastside . . . STG-II per POR *dated 2/04/2007* page 11." (Italics added.) The source document, the POR dated February 4, 2007, presumably prepared in 2007, not 2015, was not part of any exhibit. Further review of the exhibits admitted into evidence reveal that many of these documents that referenced this 2007 report set forth the full title of the entry: "CDCR 812 STG NOTICE OF CRITICAL CASE INFORMATION—SAFETY OF PERSONS (Non-Confidential Enemies)." Thus, the reference to safety of persons (non-confidential enemies) suggests that this gang association was routinely flagged in Southward's prison records year after year to *protect* Southward from potential enemies because of his *past, pre-prison* gang association, not to indicate that he was currently a member of a gang or involved in gang activity. In any event, while it may not be clear why a box for gang connection was marked on People's exhibit 21, one thing is absolutely clear: People's exhibit 21 does not establish by substantial evidence

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announced that, in 2008, prison investigators concluded that Southward was involved in the conspiracy. However, People's exhibit 22 contained prison records dated April 4, 2008 that state "there is not enough evidence to charge Southward with being involved."

that Southward was an active Eastside gang member as recent as 2015.

Once the premise that Southward was identified as an active gang member in 2015 fails, the following three additional factual findings fall as well. First, "[n]othing in the record suggests that [Southward] has developed the mechanisms to act with autonomy and to reject the gang lifestyle he has embraced since he was only 10 years old." Second, Southward "has not demonstrated that he has developed the skills to resist this pattern of [turning to gang culture and violent criminal] behavior if released." Third, Southward "appears to have little methods of sustaining himself outside of his gang association and criminal behavior."

The prosecution failed to establish by a preponderance of evidence that Southward could not act with autonomy, had not developed skills to resist his past behavior, or had little method of sustaining himself outside of his gang associates and criminal behavior. Since graduating from the Behavior Management Unit program in 2009 where he successfully completed Anger Management, Life Skills, and substance abuse classes, Southward demonstrated a dramatic shift in his behavior. He has not committed any violent acts, or received any serious rule violations reports or a single counseling chrono for even a minor grooming infraction since 2008. In sum, Southward's turnaround since 2008 has been remarkable.

While incarcerated, Southward developed marketable skills that could sustain himself in the outside world. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(8).) Southward taught himself to read and write and even authored three books. Southward participated in numerous vocational programs including

carpentry and painting. For the preceding three years, he was a porter, earning "[e]xceptional" reviews in every category including attitude toward his supervisor, staff and fellow inmates.

Southward made detailed plans for sustaining himself in the future upon his release. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(8).) He was accepted to the Anmity program which would provide him with housing and even pick him up directly from prison. The Wiengart Center and Homeboy Industries also accepted Southward. Each program offers comprehensive wrap around services including counseling, vocational training and job placement. His mother promised him housing and a job as a home health provider.[4] Southward personally presented the trial court with a thorough and reflective 13 point plan for his future, proclaiming, he will "be a productive citizen in society. . . . [He is] taking full responsibility for all [his] actions and [is] willing to work overtime because [he is] tired of being a loser."

In sum, the People failed to prove that Southward was unable to sustain himself outside of a gang lifestyle and to develop the life skills to resist violent criminal behavior if released. The record is replete with evidence to the contrary establishing Southward's rehabilitation. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1227.)

As shown, four facts were not proven by the People. Yet, these facts were critical to the trial court's finding that Southward would pose an unreasonable risk of danger to public

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[4] Sadly, his mother has passed away since making her offer. Her husband, Southward's stepfather, has agreed to house Southward.

safety if resentenced. It is true that substantial evidence supported other facts, noted in the majority opinion. While these facts may have played a significant role in the trial court's finding, it is not our role as a reviewing court to reweigh the evidence. Our evaluation is limited to determining if the above questionable facts were critical to the trial court's finding of dangerousness. Undeniably, they were crucial to the trial court's decision. The unproven fact that Southward was identified as an active gang member in prison documentation as late as 2015 was critical to the trial court's dangerousness assessment. The fact had a spillover effect and was inseparably connected to three other not proven, critical facts.[5] More significantly, from that

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[5] It is also questionable whether there was substantial evidence to support the factual assertion that while Southward "*has worked as a porter for three years, he has developed* ***no*** *professional or vocational skills that would translate into the free community*." (Italics and boldface added.) While prison records reflected Southward entered prison with "no viable work skills," those same undisputed prison records established that, in addition to working as porter for over three years, Southward learned numerous vocational skills in various prison work assignments. For example, from 1997 to 1998, he received positive reviews for his work in the yard crew and as a kitchen porter. From 1998 to 1999, he was assigned to a carpentry crew where his classification score was adjusted down due to this positive programming. In 2000, he continued to be assigned to a carpentry and painting crew, but due to institutional wide "extended [prison] lockdown[s]," his access to the programming was limited. While attending the Behavior Management Unit program at Pelican Bay prison, Southward worked as a porter. Moreover, Southward himself presented evidence that he entered prison unable to read well, but by 2016, not only was he literate, he had written three books and hoped to publish them.

fact, the trial court drew a nexus from Southward's dated criminal history,[6] his past prison misconduct,[7] and his ability to function within the law upon release. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(9).)

"[W]e believe that a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history '*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]' ([*In re*] *Lawrence*, *supra*, [44 Cal.4th] at p. 1221) ' "[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history],

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Southward provided excerpts from his writing that demonstrated his thoughtful and effective communication skills. In sum, although it is doubtful that the prosecution proved that Southward had *only* worked as a porter for three years and had *no* skills that would translate into work in the free community, it is unclear whether these facts were critical to the trial court's ruling.

[6] Southward's criminal conduct primarily occurred while he was a youthful offender. He committed his controlling offense when he was 21, his strike offenses when he was 17 and various other offenses between the age of 10 and 17. Recent developments and further reflection has informed courts and guided our California Legislature to view youthful offenders as " 'constitutionally different from adults for purposes of sentencing' because of their diminished culpability and greater prospects for reform." (*In re Jenson* (2018) 24 Cal.App.5th 266, 276.)

[7] Southward's misconduct from 1997 to 2008 was less probative of his current dangerousness given his intervening good behavior. (See *In re Rozzo* (2009) 172 Cal.App.4th 40, 60.)

when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is . . . an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]" [Citation.]' ([*In re*] *Shaputis* [(2008) 44 Cal.4th 1241,] . . . 1254–1255.)" (*Esparza*, *supra*, 242 Cal.App.4th at pp. 745–746.)

At the time of Southward's petition, significant time had passed since Southward had engaged in any misconduct—10 years. Nevertheless, the trial court leaned upon Southward's dated criminal history and prison misconduct in order to deny relief. It is unquestionable that the trial court connected Southward's past misdeeds to current dangerousness by relying on the unsubstantiated fact that Southward was identified as a gang member in 2015.

Where, as here, a trial court relies on facts, critical to its decision that were not proven by the prosecution, the trial court abuses its discretion. (*Esparza*, *supra*, 242 Cal.App.4th at pp. 744–745.) The abuse of discretion " 'standard is unquestionably deferential, but certainly is not toothless.' " (*Id*. at p. 745.) Since the trial court relied on facts not proven by a preponderance of the evidence that were critical to the trial court's finding, Southward is entitled to a new sentencing hearing where the prosecution will bear the burden of establishing that he *currently* poses an unreasonable risk of danger to public safety.

Accordingly, I would reverse the trial court's order and remand for a new sentencing hearing.

KALRA, J.